

IN THE SUPREME COURT OF MISSISSIPPI

JACKSON COUNTY BOARD OF SUPERVISORS AND
B&B ENTERPRISES, LLC

APPELLANTS

VERSUS

2010-CA-00116

CRYSTAL HAYES, CAROLE MIZE
AND AMBER HESLER

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Jackson County Board of Supervisors- the governmental body that made the original zoning decision;

B&B Enterprises, LLC- the owner of the property seeking to be re-zoned;

Crystal Hayes, Carole Mize and Amber Hesler- residents of Jackson County that object to rezoning and filed the initial appeal to the Circuit Court;

Douglas Lamont Tynes, Jr.- attorney for Crystal Hayes, Carole Mize and Amber Hesler;

William T. Reed- attorney for B&B Enterprises, LLC;

Kathy Blackwell Parker- attorney for Jackson County Board of Supervisors; and

Honorable Robert P. Krebs- Jackson County Circuit Court Judge.

By: Kathy Blackwell Parker

Kathy Blackwell Parker

Attorney for the

Jackson County Board of Supervisors

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**BRIEF OF APPELLANT, JACKSON COUNTY, MISSISSIPPI,
ACTING BY AND THROUGH ITS BOARD OF SUPERVISORS**

COMES NOW, the Appellant, Jackson County, Mississippi, by and through counsel, and files this its Appellant's Brief in the above referenced cause and would show the Court as follows:

I. STATEMENT OF THE ISSUE

Whether the decision of the Jackson County Board of Supervisors granting B&B Enterprise's application to rezone the subject property from R-1A to R-2 was arbitrary, capricious, discriminatory, illegal or without a substantial evidentiary basis?

II. STATEMENT OF THE CASE

This case is an appeal of a zoning decision. B&B Enterprise (hereinafter "B&B") initially requested for a zone change for a parcel of land on Dantzler Road in the Latimer Community from R-1A to R-4. The Planning Commission denied the request, and B&B timely appealed the decision to the Board of Supervisors. At the hearing before the Board of Supervisors on February 2, 2009, B&B downgraded its request and asked that the property be rezoned from R-1A to R-2. The Board of Supervisors granted the request, and Hayes, Mize and Hesler (hereinafter collectively referred to as "the Objectors") ultimately appealed the decision of the Jackson County Board of Supervisors (hereinafter "the Board") to the Circuit Court. On December 22, 2009, Honorable Robert P. Krebs reversed the decision of the Board. The Board timely filed a Notice of Appeal to this Court.

SUMMARY OF THE ARGUMENT

The decision of the Board of Supervisors to grant a zone change from R-1A to R-2 was supported by the substantial evidence on the full record before the Planning Commission and the Board of Supervisors, especially considering that the only substantial difference between the two

zoning districts is the allowance of duplexes in R-2. (See R. pages 122 and 126, Excerpts from the Jackson County Zoning Ordinance, Zones R-1A and R-2 respectively). There was evidence presented that there were numerous duplexes in the area, that the area had grown substantially, that there was a great influx of people moving to this area after the devastation of Katrina, and that the high cost of insurance and building costs related to Katrina justified rezoning the area to allow for this slight increase in allowed density. As such, the decision of the Board of Supervisors to grant the zone change was not arbitrary or capricious.

IV. ARGUMENT

A. Standard of Review

The Mississippi Supreme Court has stated the standard of review for zoning as follows: [Z]oning is not a judicial matter, but a legislative matter. On appeal, the decision of the Board must be upheld unless it is ‘arbitrary, capricious, discriminatory, or is illegal or without a substantial evidentiary basis.’ Therefore, the decision to rezone will not be disturbed where it is ‘fairly debatable.’ ‘Fairly debatable is the antithesis of arbitrary and capricious.’ (Citations omitted). *Edwards v. Harrison County Bd. of Supervisors*, 22 So. 3d 268, 274 (Miss. 2009). The Court has further held that “[t]he action of the Board of Supervisors in enacting or amending an ordinance, or its action of rezoning, carries a presumption of validity, casting the burden of proof upon the individual or entity asserting its invalidity.” *Faircloth v. Lyles*, 592 So. 2d 941, 943 (Miss. 1991). Therefore, the Objectors have the burden to prove that the Board’s action in granting the request to rezone was “unreasonable, arbitrary and capricious” .

B. The Decision of the Jackson County Board of Supervisors to Rezone the Subject Property Was Not Arbitrary or Capricious and Was Supported by Substantial Evidence.

Before an application should be approved, the applicant “must prove by clear and

convincing evidence either that (1) there was a mistake in the original zoning, or (2) the character of the neighborhood has changed to such an extent as to justify rezoning and that a public need exists for rezoning.” *Childs v. Hancock County Bd. of Supervisors*, 1 So. 3d 855, 860 (Miss. 2009). There is no allegation that there was a mistake in zoning. Thus, in order for the Board to approve B&B’s request to rezone, B&B had to prove both that the character of the neighborhood has sufficiently changed to justify a zone change and that a public need exists for the rezoning.

At the hearing before the Planning Commission and the Board, B&B satisfied the criteria of change in character of the neighborhood and public need by presenting the following evidence:

1. The Representative for B&B demonstrated that the character of the neighborhood has changed to higher density due to the many duplexes in the immediate areas, including Scott and Jean Street. (See Record at p. 41, lines 24+, p. 42, lines 1-6, Transcript of Planning Commission Hearing, PC# 5010).

2. The Representative for B&B testified about the increased numbers of higher density areas in the surrounding neighborhood by the change to R-4 zoning in the Dantzler and Scott area and by the increased number of duplexes in the surrounding area. (Record at p. 39-45, Transcript of Hearing before the Planning Commission, PC#5010).

3. The record show that even one of the objectors (not a party to this appeal) at the Planning Commission Hearing testified that there are “[..]ten duplexes off of Jean Street”. (See Record at p. 45, Transcript of Hearing before the Planning Commission, PC#5010, Wallace testimony, p. 8, lines 23-25).

4. The record shows that one of the objectors at the Planning Commission testified that her husband “[...] had watched this community go from wooded area to multiple homes”. (See

Record at p. 51, Transcript of Hearing before the Planning Commission, PC#5010, Ewing testimony, lines 23-25).

5. Counsel for B&B pointed to the widening of nearby Tucker Road in response to the increased traffic flow through the area as a significant change in the character of the neighborhood. (See Record, p. 45, Transcript of Hearing before the Board of Supervisors.)

6. As to public need, B&B established the public need for this zone change by pointing to the need for housing north of I-10 due to flood elevation requirements and the resulting increase in building costs and the increased costs and difficulty of obtaining insurance in other parts of the County. (See Record at p. 24, Transcript of Board of Supervisors Hearing PC#5010, lines 1-7.) As to this testimony, this Court has determined that, in making its decision, the Board of Supervisors can properly consider its own familiarity and common knowledge of the area sought to be rezoned and the affected area. *Childs v. Hancock County Bd. of Supervisors*, 1 So.3d 855, 860 (Miss.2009). Certainly, it is reasonable that the Board of Supervisors is well-aware of the affect that Hurricane Katrina had on the growth, needs and obstacles in development of all areas of Jackson County.

In sum, the Board's decision is clearly supported by the substantial relevant evidence when the Court considers all of the evidence discussed *supra* and the other evidence in the record.

Furthermore, the fact that the Objectors were not in Board room at the time of the hearing before the Board does not render the decision to rezone to R-2 arbitrary or capricious. The Board had before it the full record of the Planning Commission, including the transcript of the previous hearing and any letters of concern or protest for the change in zoning. Indeed, all three of the Objectors who complained that they were not able to voice their opposition in this matter

testified at the Planning Commission. (See R. at pp. 46-49, Mize testimony; R. at pp. 40-50, Hessler testimony; and R. at pp. 50-51). Their concerns and objections, as well as the objections and concerns of others, were transcribed and included in the record that was reviewed and referenced by the Board of Supervisors prior to its decision. A review of the record shows that the Board was fully apprized of the positions of both sides on this matter, including the objectors.

As stated previously, the Court is limited to a review of the record made before the Board when its decision was reached and may not stray from the record. *See Riley v. Jefferson County*, 669 So.2d 748, 750 (Miss.1996); *Mathis v. City of Greenville*, 724 So.2d 1109 (Miss.Ct.App.1998); and *Mayor and Board of Aldermen v. Hudson*, 774 So.2d 448 (Miss.Ct.App.2000). Additionally, the Court is prevented from substitution of its own judgment in place of the board's wisdom and soundness used in reaching the decision. *See Broadacres, Inc. v. City of Hattiesburg*, 489 So.2d 501, 505 (Miss.1986) and *Faircloth v. Lyles*, 592 So.2d 941, 943 (Miss.1991). In this regard, "[t]he zoning decision of the [Board] which appears 'fairly debatable' will not be disturbed on appeal, and will be set aside only if it clearly appears the decision is arbitrary, capricious, discriminatory, illegal or is not supported by substantial evidence." *City of Biloxi v. Hilbert*, 597 So.2d 1276, 1280 (Miss.1992). Finally, if the Board's decision is one that could be considered "'fairly debatable,' then it cannot be considered arbitrary or capricious." *City of Biloxi v. Hilbert*, at 1281. Nonetheless, a review of the record also shows that there was testimony that there were numerous duplexes in the surrounding area, that there was R-4 zoning in the area signifying higher density residential changes in the area, increased traffic flow in the area, and the public need for housing north of I-10 after Hurricane Katrina. Furthermore, as can be seen after a review the provisions of R-1A and R-2 of the zoning ordinance, the only substantive difference between the two is that R-2 allows for duplexes. This

record, coupled with other evidence in the record, render the decision at the very least "fairly debatable". Therefore, the decision of the Board cannot be considered arbitrary or capricious.

CONCLUSION

Based on the foregoing arguments and the record, the Board maintains that it did not act in an arbitrary or capricious manner when it granted the zone change from R-1A to R-2. The Board's decision carries a presumption of validity and again, puts the burden upon the Objectors to prove that the Board's action was arbitrary and capricious. The Board's decision is, at a minimum, fairly debatable; therefore, it cannot be considered arbitrary and capricious. As such, Jackson County respectfully requests that this Court reverse the trial court's decision and uphold the Board's decision granting B&B's application to rezone.

JACKSON COUNTY BOARD OF SUPERVISORS

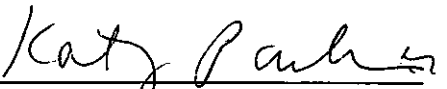
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CERTIFICATE OF SERVICE

I, Kathy Blackwell Parker, do hereby certify that I have this day hand-delivered, a true and correct copy of the above and foregoing *Brief of Appellant, Jackson County Board of Supervisors* to Honorable Douglas L. Tynes, Jr., Post Office Box 96, Pascagoula, Mississippi 39568-0966, and Honorable William T. Reed, Post Office Box 1428, Pascagoula, Mississippi 39568-1428 and Honorable Robert P. Krebs, Post Office Box 998, Pascagoula, Mississippi 39568.

SO CERTIFIED, this the 2nd day of August, 2010.



Kathy Blackwell Parker
Special Counsel